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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC POZAR,

Defendant and Appellant.

F077541

(Super. Ct. No. VCF353416)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Timothy L. O’Hair, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Eric Pozar was convicted by a jury of committing several crimes against his girlfriend during a domestic violence incident, including injuring a cohabitant and assault with a deadly weapon. The trial court sentenced him to six years in prison.

He raises three contentions on appeal: (1) the trial court erred by denying his pretrial request to discharge his retained counsel, substitute in new retained counsel, and continue the trial; (2) the prosecutor improperly vouched for the credibility of the victim during closing argument; and (3) part of his sentence should have been stayed pursuant to Penal Code section 654.¹ We conclude the trial court denied his right to counsel of choice under *People v. Ortiz* (1990) 51 Cal.3d 975 (*Ortiz*), which automatically requires reversal, and therefore do not address his remaining claims.

STATEMENT OF THE CASE

On January 5, 2018, the Tulare County District Attorney filed an information charging Pozar with forcible rape (§ 261, subd. (a)(2); count 1), two counts of injuring a spouse or cohabitant (§ 273.5, subd. (a); counts 2 and 3), assault with a deadly weapon—a knife (§ 245, subdivision (a)(1); count 4), false imprisonment by violence (§ 236; count 5), assault by means likely to produce great bodily injury (§ 245, subd. (a)(4); count 6), and criminal threats (§ 422; count 7). In counts 5, 6, and 7, it was alleged Pozar personally used a deadly and dangerous weapon—a knife. (§ 12022, subd. (b)(1).)

The jury found Pozar not guilty of counts one, two, and six. The jury convicted Pozar on the remaining counts and found true the weapon use enhancements in counts five and seven. He was sentenced to an aggregate term of six years in prison, consisting of the upper term of four years in count four, a concurrent term of three years in count three, and a consecutive term of one year each in counts five and seven.

FACTS

The crimes

Pozar and A., his then-girlfriend, had known each other for about two years and were in an on-again, off-again relationship. In July 2017, A. was living mostly at Pozar's house. They had a fight on the night of July 4 that became physical. Pozar was later

¹ Unidentified statutory references are to the Penal Code.

charged with one count of rape and one count of infliction of corporal injury on a cohabitant arising out of the incidents that day, but the jury in this case acquitted him of both charges.

By July 10, 2017, Pozar and A. had agreed to end their relationship and that A. would move out. On the evening of July 10, while A. was packing up her things in the house, she approached Pozar with a written list of problems regarding their relationship. The events of July 4 were included in the list. Pozar took the list and began mocking her. A. became upset and Pozar pushed her to the ground and then made her sit on the couch. He took a pen and began marking up her notebook and wrote rude words describing her. When she told him to stop or told him he was being a “monster,” he would hit her in the head, face, and neck with his open hand. He pushed her down when she tried to get up from the couch. She asked if she could leave, but he did not allow her to leave.

Pozar took A. outside to her car to get her phone, computer, and iPad. He took those items, along with her car keys and wallet, and kept them from her in a safe. He then took her to his bedroom and began asking her questions regarding each time she had lied to him or betrayed him. He was convinced she had cheated on him. He shoved her off of the bed multiple times and hit other parts of her body.

He grabbed a hunting knife in his bedroom and, at one point, ran it across her face and neck. He grabbed one of her toes and threatened to cut it off if she did not tell the truth. The pressure of the knife caused a small cut on her toe. He put the knife into her mouth and pulled the side of her mouth with the blade. He traced a smile on her face and said he was going to give her “a smile like The Joker” if she did not tell him what he wanted to hear.

Pozar later began cutting chunks of her hair with the knife. He cut her hair at least six or seven times, but no more than 10 times. He told her he would stop cutting when she told the truth. A. testified she was “terrified” during the hair cutting. Pozar

eventually stopped cutting A.'s hair and allowed her to go to the bathroom to wash her face and clean up.

After leaving the bathroom, A. began to "shut down." Pozar offered her a choice: she could either snort a line of drugs, or she could swallow "a bunch" of Xanax after which he would slip her into the tub and make her death look like a suicide. She initially refused and he began slapping her. He then began writing a suicide note. Believing he was serious about killing her and making it look like a suicide, A. reluctantly chose to snort the line of drugs. She believed the line of drugs was comprised of methamphetamine, cocaine, Adderall, and Klonopin. Remnants of the line of drugs later tested positive for methamphetamine and amphetamines. He continued questioning her after she took the drugs.

Throughout the night, Pozar threatened to kill A. multiple times and also threatened her family and her cat. After approximately 11 hours had passed since A. approached Pozar with the list, Pozar led A. to the kitchen and said he wanted her to make him something to eat. When Pozar changed his mind about being hungry and went back to his bedroom, A. escaped out the back door and found a neighbor who let her call police.

Pre-trial proceedings

The Tulare County District Attorney filed charges on July 13, 2017. Pozar was arraigned that same day, where he pled not guilty and a preliminary hearing was scheduled for August 14, 2017. He also on that day waived his right to have his preliminary hearing within 10 days and his right to be tried within 60 days.

On July 19, 2017, attorney Sara Bratsch filed a substitution of attorney to become Pozar's attorney of record, which was signed by Pozar and Pozar's then counsel. Pozar's time waiver remained until his preliminary hearing on December 11, 2017. After he was

held to answer, an information was filed on January 5, 2018.² Pozar was arraigned on the information on January 8; he did not waive time for trial, and trial was accordingly set for February 20. On February 16, the court granted the prosecution's unopposed motion to continue the trial to February 27. The trial was estimated to take three days.

At a hearing on February 23, Pozar's counsel informed the court that Pozar had fired her and had retained new counsel. The relatively short hearing proceeded in substantive part as follows:

“[THE COURT]: I thought it was in your best interest resolution or best interest to resolve this matter for what we talked about, but you're certainly entitled to have your day in court and have a jury decide. But some of the aspects of what happened here—I think a jury could—as I've told you, is going to find very unsettling. And I don't think this whole case is going to play out well for you in how a jury perceives your actions. And if they don't like you, they can convict you of everything. That—that's the risk you run. Of course, it—I know I told you this, your lawyer's told you this, but at this point I'm simply going to confirm your matter for trial. I'll see you at 1:30 on Monday. I intend to have a jury panel here at 9:30—or 10:00 o'clock on Tuesday. Let me tell you this, sir—

“[DEFENSE COUNSEL]: Your Honor, may I interject?

“[THE COURT]: Let me—I'm going to say one other thing. As far as I'm concerned, once that jury panel comes in here, all bets are off. No more deals. If I'm bringing a jury panel in here, you're going to go to trial. So if you're going to resolve this, it better be by Monday. Don't think you're going to show up on the day of trial and think this case is going to settle. That is not going to happen. Go ahead.

“[DEFENSE COUNSEL]: Your Honor, there's been some recent developments. My investigator and I did speak to Mr. Pozar. He did in all good faith want to settle the case, that's why we had him transported today to enter a plea. He has since changed his feeling about the case and he has since asked for me to be relieved as attorney of record. He has hired Marguerite—Melo and Sarsfield as the new attorney of record. He did not personally, but his mother did. I believe that they're meeting on Sunday to

² Subsequent references to dates are to dates in 2018.

finalize the contract. And she'll be present on Monday to substitute in. She's in San Francisco.

“[THE COURT]: No. This is a no time waiver. I'm not relieving you, Ms. Bratsch. Be prepared to go to trial on Monday.

“[DEFENSE COUNSEL]: Okay. I would like to put this for the record, though, that I have been fired by my client and that Marguerite is going to be coming in to substitute in and would be asking for a time waiver. My client is willing to waive time to have Ms. Marguerite Melo, the attorney of his choice, be present on Monday.

“[THE COURT]: Well, we can all take a look at where that is and—procedurally where that leaves us. We'll probably take that up Monday at 1:30.

“[THE PROSECUTOR]: Are we still set for JTC Monday or are we confirming it today?

“[THE COURT]: I'm confirming it. We'll do a JTC Monday at 1:30 along with motions in limine. But if the defendant has a right to fire her and waive time—you're going to tell me whether he can do that or not. As far as I'm concerned, two days before the trial Ms. Bratsch is not going to be able to get out of the case and go—we're going to go to trial. People are subpoenaed. It was a no time waiver—

“[THE PROSECUTOR]: I just want to make sure that I can tell my witnesses that it's confirmed so they can be here.

“[THE COURT]: It's confirmed for trial.

“[THE PROSECUTOR]: And as you know, no offers are made after we confirm a trial.

“[THE COURT]: Right.

“[THE PROSECUTOR]: Policy of our office.

“[THE COURT]: All right.

“[THE PROSECUTOR]: Thank you.”

The trial confirmation hearing (referred to by the parties and the court as a “JTC”) took place on Monday at 1:30 p.m. where motions in limine were heard. Pozar was still represented by Bratsch at the hearing and neither Marguerite Melo nor any other new

counsel for Pozar was present. No mention was made of Pozar's prior request to discharge his retained counsel and substitute in new retained counsel.

Trial commenced on Tuesday, February 27. On March 1, after A. and the lead detective had testified and the trial was almost over, Pozar himself moved for a mistrial in part on the grounds the trial court had not allowed him to substitute in Melo as his counsel prior to trial. The trial court denied the motion for a mistrial. The court explained:

"You have a lawyer privately retained. You have an investigator who's there to help you. I would have continued the trial and allowed Ms. Melo to come in, but you never waived time. You've never agreed to waive time, so I have to—I had to do this trial... You left me with no choice. So I don't intend to fire your lawyer. I don't intend to relieve her. I intend to go forward with this trial and you can bring that up in a motion for a new trial if you are convicted, which I'd be shocked if you weren't."

Pozar responded:

"... [W]hen Ms. Bratsch brought up to you on that Friday [February 23] that she was being fired, you did not allow it and there was never even an opportunity for me to waive more time. I absolutely would have if that would have allowed me to—but that—but you were, like, no way. I mean ... that's undeniable ... absolutely I would waive time. That—that was not even a question... You knew that I wanted Marguerite Melo and John and that—that was actually part of what we wanted to do was waive more time so that they could prepare for the case, but you said absolutely not. And this is before the trial took place. And I had a problem with my attorney before trial ever went south. It was before the trial even took place, I had a problem. And I made that known, your Honor."

Defense counsel added:

"What my client is indicating is true. On February 20th, he did present me a letter wishing to terminate our services effective immediately, final on February 20th. However, I told him, let's make one last-ditch attempt to try and settle your case... After two days, I believe, after sleeping on it, [Pozar], on Friday, once he was transported, informed me that he still wished to fire me, for me to admit the letter into evidence that he no longer wished to have my services.

“His mother ... had been in constant communication with Melo and Sarsfield. I had numerous conversations with them. They desperately wanted to substitute in on the case, but Ms. Melo had something—she had to be in San Fransico at another hearing, so she could not be physically present....

“He desperately did want Ms. Melo. They were ready to be hired. They were ready to come in on Monday to substitute in. And unfortunately, the Court did not allow that to even take place on Monday. So that would be my only record.”

The court answered:

“Here’s my position. There was never a time waiver. Had there been a time waiver, I would have allowed—I would have vacated the trial date and put the matter over to allow the defendant to seek other counsel. But never once was there a time waiver. As a result I had to try this case within the 60 days. My hands were tied. I had to force the issue. That’s why I would not let you off as attorney of record last week because trial was starting today. There was no time waiver. Absent that, this case had to go to trial.”

Defense counsel responded:

“Right. And I think maybe what my client is trying to articulate is that he was trying to waive time to fire myself and find new counsel, but I—I think he felt like he was cut short on Friday and couldn’t even waive time. So when you denied the request that I be fired and Marguerite subbed in, he felt like he had no choice but to go on Tuesday.”

The prosecutor responded:

“...I was present on Friday and heard what your Honor said regarding defense counsel being fired. What I recall is that you said if she was going to be fired, you asked that her—that new counsel be present on Monday at the JTC at 1:30 and that was what you ordered, and that was how we ended the hearing. At the JTC at 1:30 on Monday it was Ms. Bratsch who was present to represent her client and there was never a request made to substitute a new attorney or to waive time and request a continuance on Monday at 1:30.”

Pozar interjected:

“I would like to address that... I would have to disagree with that. He did, in fact, say that, no, you are sticking with trial. You are not fired. You did say that.”

The court said:

“I will say this, that I was told on Friday that—might be Ms. Melo coming in. I saw Ms. Melo on Friday. She informed me that she had not been retained on this case and she would not be representing the defendant in this case.

“Absent a time waiver, I had no choice but to move forward with this trial. And that’s what we’re doing. Bring the jury in.”

Later that day, Pozar informed the court he had not had sufficient time to discuss with his counsel whether or not he would be testifying or how to even prepare to testify. The court stated it would allow Pozar time to discuss these issues with his counsel, and also asked whether Pozar wished to proceed in pro per. Pozar declined to represent himself, explaining he would be unprepared. Pozar then stated again his request to substitute retained counsel Melo, and again offered to waive time.

The court responded:

“Ms. Melo, or whoever the person told me they were not going to represent you. So you never made arrangements for somebody else to represent you.

“And let me put this on the record. There were discussions last week about discharging your attorney and that you would be hiring Ms. Melo and lawyers from her firm. It just so happened that she was in my court on Friday and I asked her if she was going to be representing ... you. She told me she would not be coming on into the case, she would not be representing you.

“So given the fact there was no time waiver, you were arraigned on January 8, your case had to be tried on or before March 9. We put your matter on calendar February 23, at your lawyer’s request to resolve this case, at which time you rejected the—the offer made by the People.

“We were back on Monday, February 26, for motions in limine. Your counsel participated in litigating those pretrial issues and, in fact, filed a brief on your behalf. There was no effort at that time to discharge your

attorney. We were back on the 27th for jury selection. There was no mention on Monday or Tuesday during jury selection that there were any issues regarding the attorney-client relationship.

“The bottom line for the court is that without a time waiver, you had to be tried on or before March 9th. The court is allowed and has discretion to deny a motion to discharge an attorney if it would result in significant prejudice to the defense, which I do not find here. Your lawyer has done the best job she could. She’s filed motions on your behalf. Lawyers are only as good as the facts they have. You don’t have good facts in this case.

“The other option is, if it will—if it is untimely and resulting in the disruption of an orderly process of justice, citing *People v. O’Malley*, a 2016 case, 62 Cal.4th 944; and *People v. Verdugo*, a 2010 case, 50 Cal.4th 263, the court does find that seeking to discharge a retained attorney at this stage of the proceedings would result in a significant disruption in the orderly process of justice. That’s all. See you at 1:30.”

After the lunch recess, Pozar informed the court that he did not wish to testify and that he “rest[ed] his case.” The trial thereafter continued to conclusion.

DISCUSSION

A. Background Law

The Sixth Amendment right to counsel of a defendant who does not require appointed counsel generally includes the ability to choose the attorney who will represent him or her. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144.) This right includes the authority to discharge an attorney the defendant no longer wishes to retain (*People v. Verdugo* (2010) 50 Cal.4th 263, 310-311 (*Verdugo*); *Ortiz, supra*, 51 Cal.3d at p. 983), which may be exercised with or without cause. (See *Ortiz*, at p. 983 [“[t]he right to discharge retained counsel is based on “ ‘necessity in view of both the delicate and confidential nature of the relation between [attorney and client], and of the evil engendered by friction or distrust’ ” ”]; *People v. Lopez* (2018) 22 Cal.App.5th 40, 46 (*Lopez*) [same]; see also *People v. Courts* (1985) 37 Cal.3d 784, 789–790 (*Courts*) [[u]nderlying this right to retained counsel of one’s choice “is the premise that ‘chosen representation is the preferred representation. Defendant’s confidence in his lawyer is

vital to his defense. His right to decide for himself who best can conduct the case must be respected whenever feasible’ ”].)

Still, the right to discharge retained counsel is not absolute. (*People v. Maciel* (2013) 57 Cal.4th 482, 512 (*Maciel*); *Verdugo*, *supra*, 50 Cal.4th at p. 311; *Ortiz*, *supra*, 51 Cal.3d at p. 983.) “[T]he ‘fair opportunity’ to secure counsel of choice provided by the Sixth Amendment ‘is necessarily [limited by] the countervailing state interest against which [this] right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of “assembling the witnesses, lawyers, and jurors at the same place at the same time.’ ” ” (*Ortiz*, at pp. 983-984; accord, *Lopez*, *supra*, 22 Cal.App.5th at p. 47.) Thus, the trial court has the discretion to deny a motion to discharge retained counsel when discharge will result in “significant prejudice to the defendant [citation], or if it is not timely, i.e., if it will result in disruption of the orderly processes of justice.” (*Maciel*, at p. 512, internal quotation marks omitted; accord, *Verdugo*, at p. 311; *Ortiz*, at p. 983.) Stated conversely, “[a]bsent a proper finding of unwarranted disruption of the orderly process of justice, a court may not force a defendant who timely requests substitution to go to trial represented by retained counsel he no longer trusts.” (*People v. Stevens* (1984) 156 Cal.App.3d 1119, 1128, fn. omitted.)

We review a trial court’s denial of a request to discharge counsel to retain new counsel, when such a request also necessitates a continuance of the trial, for abuse of discretion. (*Ortiz*, *supra*, 51 Cal.3d at p. 984.) The trial court “must exercise its discretion reasonably: ‘a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.’ ” (*Ibid.*; see *Courts*, *supra*, 37 Cal.3d at p. 791 [trial courts should accommodate requests for continuances to allow the defendant to discharge and substitute retained counsel “ ‘to the fullest extent consistent with effective judicial administration’ ”].) Furthermore, “[t]o exercise the power of judicial discretion, all

material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision.” (*People v. Lara* (2001) 86 Cal.App.4th 139, 165.) The erroneous denial of a defendant’s right to discharge retained counsel is presumptively prejudicial and automatically requires reversal. (*Lopez, supra*, 22 Cal.App.5th at p. 47.)

B. Analysis

1. Abandonment/Forfeiture

Pozar is solely challenging the trial court’s denial of his request to discharge his counsel on Friday, February 23. The first step in our analysis here is to determine whether Pozar abandoned his request by not raising the issue again on February 26, as the People contend he did. We perceive the People’s argument to be that the court’s February 23 order was only interlocutory or advisory—as opposed to definitive—and therefore Pozar was required to appear with his new counsel on February 26 or to otherwise renew his request to discharge his current counsel, lest he abandon his request. We disagree with the People, and conclude Pozar was not required to raise the issue again on Monday in order to preserve the issue for appeal.

Generally, a defendant will be deemed to have forfeited an issue for appeal when he or she does not press the lower court for a ruling on the issue and thereby “ ‘deprive[s] the trial court of the opportunity to correct potential error.’ ” (*People v. Ramirez* (2006) 39 Cal.4th 398, 450.) Here, Pozar did receive a definitive ruling on February 23 regarding his request to discharge his counsel, and in these circumstances was not obligated to raise the issue again. His counsel, Bratsch, told the court that she had been fired, Marguerite Melo had been hired, and that Pozar was willing to waive time that day to accommodate Melo’s substituting in. Bratsch also said Melo could not be in court that day because she was in San Francisco but that Melo would be present on Monday and would be asking for a time waiver also. The court denied the substitution request and confirmed the case for trial, even though there was a trial confirmation hearing scheduled

for Monday. In confirming the case for trial, the court also ensured the prosecutor she could tell her witnesses the case was going to trial on February 27.

The court's words in denying the request indicate the denial was based on the facts that the request was made two days before trial, witnesses had been subpoenaed, and Pozar had not previously waived time. Notably, the trial court said to the prosecutor, "I'm confirming it.... But if the defendant has a right to fire her and waive time—you're going to tell me whether he can do that or not. As far as I'm concerned, two days before the trial Ms. Bratsch is not going to be able to get out of the case and go—we're going to go to trial. People are subpoenaed. It was a no time waiver[.]" The defense reasonably interpreted this to mean that the trial court simply believed Pozar had no right at that point to substitute counsel and enter a time waiver; it would appear Pozar was past the point of no return, in the court's view. The court in no way indicated its ruling was only interlocutory. Contrary to the People's contention, the court did not list any conditions or make any orders that needed to be satisfied on or before Monday in order for the court to even consider changing its ruling.

Even though Pozar informed the court he had affirmatively fired his counsel, retained new counsel who was ready to substitute in the next court day, and was willing to waive time that day, the court responded with words demonstrating a position that the case was irreversibly headed to trial unless a plea deal could be reached. Thus, from the defense's perspective, raising the issue again on February 26 with Melo present would have been futile. This is primarily because if two days before trial was too late to substitute counsel and waive time, then certainly one day before trial would also be too late. It did not appear that the trial court's denial of Pozar's request was based on Melo's personal absence from the courtroom.

The People focus on the court's statement on February 23 that they could "take the issue" up on February 26. After the court said that, however, the prosecutor asked if the court was confirming the case for trial that day, and the court said, "I'm confirming it."

The prosecutor, to ensure trial was confirmed, followed up with, “I just want to make sure that I can tell my witnesses that it’s confirmed so they can be here.” The court responded, “It’s confirmed for trial.” Thus, while the trial court momentarily injected a measure of ambivalence into its ruling by indicating they could all take the matter up on Monday, any uncertainty as to the definitiveness of the court’s ruling was quickly dissipated when the court twice reiterated the case was confirmed for trial despite the scheduled trial confirmation hearing on February 26. The court could have told the prosecutor it was waiting until Monday to confirm the trial, but it did not. In our view, the trial court’s words could not fairly be construed as imparting an obligation on Pozar to renew his request on February 26 lest he be deemed to have abandoned it. We conclude therefore that the trial court’s remark about the possibility of “taking [the issue] up” on February 26 did not affect the definitiveness of the court’s ruling, and in turn Pozar had no obligation to renew his request.

2. Abuse of Discretion

We turn now to whether the trial court abused its discretion in denying Pozar’s substitution request. We determine the trial court abused its discretion because there are no facts to support an implied finding that granting Pozar’s substitution request would have worked to prejudice Pozar or disrupt the orderly process of justice.

At the outset of our analysis, we note that we must review the trial court’s February 23 ruling based on the record that existed at the time the ruling was made, without indulging in hindsight. Both parties on appeal cite to conversations between the parties and the trial court during trial when the substitution issue was raised again. For example, the People contend we should consider the trial court’s statement during trial that Melo was in his courtroom after the February 23 hearing and said she would not be representing Pozar. This alleged fact, which the trial court did not put on the record on February 26 at the trial confirmation hearing, was not in the trial court’s contemplation when it made the February 23 ruling, and therefore it does not factor into our analysis.

The February 23 hearing was brief. Defense counsel represented to the court that Pozar had affirmatively fired his counsel, retained new counsel, was willing to waive time that day, and that Melo would be in court on Monday and could not be there that day because she was in San Francisco. The trial court asked no questions at all regarding these representations, and took no actions to confirm or disprove them. The trial court never asked the defendant personally if he waived time.³ Instead, all the trial court did was state that the case was two days away from trial and that witnesses had been subpoenaed, and thus counsel was not going to be discharged and trial was confirmed for the following Tuesday. The court made no findings of fact regarding how allowing substitution of counsel and continuing the trial would either prejudice the defendant or disrupt the orderly process of justice. In fact, the record does not show that the court even attempted to engage in fact finding. The trial court thus abused its discretion.

Pozar's case is analogous to *Lopez, supra*, 22 Cal.App.5th 40. In that case, the defendant had retained counsel near the beginning of his case, before the preliminary hearing. (*Id.* at p. 44.) There had been three unopposed continuances, two at the defense's request. (*Ibid.*) When defense counsel represented that the defendant would waive his right to a jury trial and have the court try the case instead, the defendant seemed unsure. (*Ibid.*) The following day, after retained counsel said he was prepared to begin trial the following week, Lopez requested to retain new counsel or have counsel appointed to represent him. (*Id.* at pp. 44–45.) The requested substitution was

³ If the court had made this simple inquiry on February 23, this appeal may well have been obviated. We are mindful that the trial court faced a common challenge of managing a calendar while fulfilling the obligation of providing a speedy trial. Over the course of months, the defendant repeatedly exercised his right not to waive time under any circumstance. The court seemed surprised to hear that, two days before the date set for trial, defense counsel appeared to be trying to withdraw from the case and, while not directly offering to waive time, represented that prospective successor counsel would do so the following Monday. While the trial court's impression may have been understandable under the circumstances, it does not negate the error under *Ortiz*.

unopposed by the prosecution. (*Id.* at pp. 44, 49.) Nevertheless, the trial court denied Lopez's request because the case was almost two years old and, in the court's view, Lopez's attorney was prepared for trial even though he was not retained to represent Lopez through trial. (*Id.* at pp. 44–45.)

The Court of Appeal reversed, finding no “basis for concluding that the trial court made an implied finding that allowing [defendant] to discharge [his attorney] ‘would result in “ ‘disruption of the orderly process of justice unreasonable under the circumstances of the particular case.’ ” ’ ” (*Lopez, supra*, 22 Cal.App.5th at p. 50.) Lopez's request to discharge his retained counsel occurred before it was clear whether the case would proceed to trial, and the trial court did not indicate it believed Lopez had improper motives in seeking to discharge counsel. (*Id.* at p. 48.) The appellate court was also concerned, because the scope of Lopez's counsel's representation excluded trial, there was a risk that requiring him to go to trial with unpaid counsel against his wishes could result in him getting “what he paid for.” (*Ibid.*) The appellate court further explained that a trial court cannot assume that discharge would lead to substantial delay based only on timing, and the trial court did not explicitly weigh concerns about the case's progress against Lopez's rights to discharge his attorney. (*Id.* at p. 49.) The appellate court concluded the age of the case and the timing of the motion just before trial was set to begin did not justify the court's denial of his motion. (*Id.* at p. 48.)

The Court of Appeal's reasoning in *Lopez* requires reversal here. Most significantly, as was the case in *Lopez*, the record here discloses no basis for concluding the trial court made an implied finding that discharging defense counsel and allowing newly retained counsel to substitute in would result in an unreasonable disruption of the orderly process of justice under the circumstances. That witnesses had been subpoenaed is insufficient to constitute a disruption to the orderly process of justice. There were no facts indicating that witnesses would become unavailable in the future, or that the trial court's calendar could not accommodate a continuance. The request was also made

before a jury pool had even been assembled for the trial, and thus there was no risk of inconveniencing jurors.

Regarding timing, Pozar's case was seven months old, where in *Lopez* the case was over two years old. Also, whereas in *Lopez* the defense had obtained two previous trial continuances, Pozar had not yet requested any. The prosecutor in Pozar's case also did not object to the substitution request or to a trial continuance. As Pozar had not yet waived time and had not yet requested any continuances, there was no indication he had any improper motives. As the *Lopez* court explained, a trial court cannot assume that discharge would lead to substantial delay based only on timing; the trial court must explicitly weigh concerns about the case's progress against the defendant's rights to discharge his attorney. (*Lopez, supra*, 22 Cal.App.5th at p. 49.) Here, while Pozar's request came just two court days before trial, the record does not indicate the trial court weighed concerns about the case's progress. Additionally, the record does not contain facts to support an implied finding that concerns about the case's progress outweighed Pozar's rights to discharge his attorney. This is because Pozar's case was relatively young and on a fast track to trial, and the case had only been continued once, for one week, at the prosecution's request.

The trial also had only a three-day time estimate. The facts were straightforward, and the practical totality of the evidence was based on Pozar's and A.'s respective statements to law enforcement. Thus, Pozar's new counsel probably would not have required a very long continuance to prepare to try this case. In any event, the trial court made no apparent effort to discern how long of a continuance would be needed, which would have been a proper factor in considering whether granting Pozar's request would have disrupted the orderly process of justice.

Interestingly, the trial court stated more than once during trial that it would have continued the trial date to allow Melo to substitute in had Pozar agreed to waive time. Two points on this: First, this statement is inconsistent with what the trial court said on

February 23. On that prior day, the court said to the prosecutor, “But if the defendant has a right to fire her and waive time—you’re going to tell me whether he can do that or not.” As we have already discussed, this demonstrated the trial court on February 23 was of the opinion that the entry of a time waiver was not allowable at that point. Second, if the trial court really would have continued the trial date had Pozar agreed to waive time, then a continuance should have been granted because Pozar in fact expressed a willingness to waive time. Specifically, his counsel said on February 23, “My client is willing to waive time to have Ms. Marguerite Melo, the attorney of his choice, be present on Monday.” This clearly demonstrates Pozar’s willingness to immediately waive time on that day, and thus, by the trial court’s own words, Pozar should have been allowed to waive time and continue the trial date to allow his new attorney to get up to speed.

Absent a proper finding of unwarranted disruption of the orderly process of justice, the trial court could not force Pozar, who timely requested a substitution of counsel, to go to trial represented by retained counsel he had reportedly fired. (*Stevens*, *supra*, 156 Cal.App.3d at p. 1128.) Since there were no facts, as of the February 23 hearing, to support even an implied finding that granting Pozar’s substitution request would have worked to prejudice him or disrupt the orderly process of justice, the trial court abused its discretion by denying the request. Pozar’s Sixth Amendment right to counsel of his choosing was thus violated, and his conviction must be reversed.

DISPOSITION

The judgment reversed and the matter is remanded for a new trial.

SNAUFFER, J.

WE CONCUR:

LEVY, Acting P.J.

POOCHIGIAN, J.